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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 530

RUTH SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23–38; R. 142a–155a) is not yet reported. The opinion of the district court denying a motion to suppress evidence (Pet. App. 43; R. 61a–62a)[1] is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1962 (Pet. App. 39–40; R. 156a). The petition for a writ of certiorari was filed on October 16, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Citation is to "Appellant's Appendix" in the court of appeals.

QUESTIONS PRESENTED

1. Whether narcotics agents had probable cause to arrest petitioner without a warrant so that the search and seizure of narcotics from her purse was valid as incidental to the arrest.

2. Whether, after petitioner had been arrested on the street and had led the agents to an apartment to produce additional heroin, she voluntarily consented to a seizure of heroin from a suitcase she gave to the agents.

STATUTE INVOLVED

Section 104(a) of the Narcotics Control Act, 70 Stat. 570, 26 U.S.C. 7607, provides:

> *Additional authority for Bureau of Narcotics and Bureau of Customs.*
>
> The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents of the Bureau of Narcotics of the Department of the Treasury, * * * may—
>
> * * * * * *
>
> (2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

STATEMENT

In a trial without a jury petitioner was convicted under Counts 3 and 4 of an indictment charging her

with receiving, concealing and facilitating the transportation and concealment of heroin in violation of 21 U.S.C. 173 and 174 (R. 6a, 7a, 66a–67a, 136a). Prior to trial, the court, after a hearing, denied petitioner's motion to suppress evidence taken from her person and in an apartment (R. 9a–10a, 61a–62a). A renewal of this motion was also denied at the conclusion of the trial (R. 130a, 131a). Petitioner was given concurrent sentences of five years on Count 3, and seven years on Count 4 (R. 136a–137a). On appeal the conviction was affirmed (R. 138a–139a, 156a).

Pertinent evidence adduced at the pre-trial hearing on the motion to suppress and at the trial may be summarized as follows:

On October 11, 1961, at about 1:40 p.m., in an apartment at Hamilton Terrace in Manhattan, narcotics agents Robinson and Scott, operating in an undercover capacity, negotiated with one Thompson for the purchase of one-quarter kilogram of heroin. Thompson said the cost would be around $3,200, but that he would have to check the price (R. 21a, 27a). At about 2:05 p.m., Thompson left the apartment to check the price of the heroin (R. 22a). Thompson was kept under surveillance by agents Wilcocki and Garofalo who saw him enter a building at 169 East 115th Street and leave about five minutes later with the petitioner. Thompson took a taxi back to Hamilton Terrace, arriving there at about 3:00 p.m. (R. 29a–30a, 22a), and informed agents Robinson and Scott that one-quarter kilogram of heroin would cost $3,600. Thompson showed the agents two one-ounce glassine bags containing a white powder which

he stated he had received from his source of supply. When asked who the source was, Thompson replied that it was a woman who worked at a store (R. 22a). Thompson made arrangements to meet agent Robinson the following day at 2:00 p.m. at 145th and St. Nicholas Avenue so that Robinson could purchase the heroin (R. 22a–23a). Shortly thereafter, while the three men were in the restroom of a restaurant, Thompson gave one of the glassine bags containing heroin to agent Scott (R. 23a–24a).

On the following day, October 12, at about 2:30 p.m., Thompson met agent Robinson on the designated corner. Thompson asked for $3,600 in advance, but Robinson refused. When Thompson asked to see the money, Robinson opened the trunk of a government vehicle and showed Thompson what was supposed to be $3,600. Thompson then left to see if his source of supply would deliver the heroin, cash on delivery (R. 24a–25a, 31a). Thompson, again under surveillance by agents Wilcocki and Garofalo, went to 169 East 115th Street where he stayed about ten minutes and then returned to agent Robinson (R. 31a–32a). Thompson informed Robinson that his source of supply would produce the heroin if paid cash on delivery. When Robinson asked who she was since he would have to meet her, Thompson replied she was a girl named Ruth, who had blue hair and worked at Goody's drug store. At a phone booth where Thompson placed a call, Robinson heard him say, "May I speak to Ruth?" and then, "Okay, I will call back in 15 minutes" (R. 25a).

Robinson entered the booth on the pretext that he was going to call his girl friend, but instead called the Bureau of Narcotics to convey the information he had (R. 25a, 32a). At about 4:00 p.m., Thompson called again and Robinson heard him say, "Okay, in 30 minutes at 13[1]st and Seventh Avenue." Robinson then gave a prearranged signal to covering agents Wilcocki and Garofalo who arrested Thompson, searched him, and seized one ounce of heroin from his person (R. 26a, 32a). Thompson told these two agents that a girl named Ruth Smith (petitioner) was to deliver a quarter of a kilogram of heroin at 4:30 p.m. at the corner of West 131st Street and Seventh Avenue (R. 33a). Agents Wilcocki and Garofalo pretended to arrest agent Robinson, placed Robinson and Thompson in separate automobiles, and then proceeded to West 131st Street and Seventh Avenue (R. 26a).

Meanwhile, agent Manley, who had been alerted by radio to look for a girl named Ruth with blue hair, had observed petitioner leave Goody's drug store and enter a building at 108 West 131st Street, where she remained for about ten or fifteen minutes (R. 40a–41a). She then walked west across Seventh Avenue on 131st Street where she was placed under arrest by agents Krueger and Cantu, who had also been alerted to look for a female with blue hair and a possible drug store uniform (R. 51a–52a, 54a). They did not have a warrant of arrest (R. 19a). The agents searched the petitioner and found in her purse a small package containing 131 grams of heroin, the narcotics involved in Count 3 (R. 52a, 71a–72a, 124a).

After petitioner's arrest at about 4:30 p.m. (R. 28a, 36a), agents Krueger and Cantu put her in the back seat of agent Garofalo's car (R. 52a). At this point there is a discrepancy in the testimony of agents Cantu and Manley. According to agent Cantu, petitioner was driven to 142nd Street with agents Garofalo, Tripodi and Cantu (R. 53a, 54a). En route on the trip covering about twenty blocks, the agents asked petitioner where she got the package and who was in the apartment they had been watching (presumably at 108 West 131st Street), and she replied that she did not know (R. 56a–57a). After the car was parked, agent Garofalo asked petitioner where she got the "stuff", who owned the apartment, and whether there was more "stuff" in the apartment. Petitioner kept saying, "No, no, I don't know anything about anything" (R. 58a–59a). Then agent Manley entered the car and questioned petitioner for a period of one-half hour to an hour (R. 57a, 58a, 59a).

Agent Manley testified that after the arrest he found petitioner in the back of a government car with two agents who had parked on 131st Street between Seventh and Eighth Avenues. Manley testified that he put the petitioner in his car and, with agent Rahas, drove her to 143rd Street and Seventh Avenue, where he parked (R. 41a). Manley then asked petitioner where the rest of the "stuff" was, to which she replied she did not have any more. Manley said, "Come on, Ruth, you know better than that." Petitioner started crying and remarked, "Yes, I have some more but I don't want to get anyone else in trouble" (R.

41a–42a). She stated that she had "kicked her husband out because he was dealing with narcotics and she was ashamed of herself" (R. 45a). Manley said, "Ruth, if this is your own, you won't be getting anybody else in trouble." Petitioner stated, "All right, I will take you to it but I will only take two of you. I don't want anyone else to go with me because I don't want to cause any trouble" (R. 42a).

Without a search warrant (R. 19a), agents Manley and Rahas then went with petitioner to 108 West 131st Street where they climbed two or three flights of stairs to reach a one-room apartment at about 5:00 p.m. (R. 42a, 46a, 47a, 76a). Petitioner knocked on the door and a man about 75 or 80 years old answered (R. 47a). Petitioner said, "Danny, there is no trouble. I just want my suitcase." Petitioner took a suitcase from behind a bed, gave Manley a key with which he opened the suitcase, and said, "The stuff is in the suitcase." It contained eleven packages of heroin upon which Count 4 was predicated (R. 42a, 44a, 48a, 76a, 78a–79a, 94a, 97a–98a, 103a, 7a). The agents did not conduct a search of the apartment (R. 77a).

ARGUMENT

1. The arresting officers had probable cause, "reasonable grounds" under 26 U.S.C. 7607(2) (*supra*, p. 2), for arresting petitioner on the street without a warrant. Such an arrest is proper where facts and circumstances known to the arresting officers at the time of the arrest are sufficient to warrant a man of reasonable caution to believe that an offense has been, or is being, committed. *Brinegar* v. *United*

States, 338 U.S. 160, 175–176; *Draper* v. *United States*, 358 U.S. 307, 310–312. Even if the position of Thompson is viewed as analogous to that of a government informer of unproved reliability,[2] as the court below does in its opinion, there was ample probable cause to arrest without a warrant. In order to have probable cause for an arrest without a warrant it was not necessary that petitioner be seen committing an incriminating act as petitioner suggests (Pet. 12). A lesser degree of evidence than that required for conviction will suffice in establishing probable cause. *Brinegar* v. *United States*, 338 U.S. 160, 172–173. The information received from Thompson, which in totality was very specific, including the place for delivery, was fully corroborated by the observations of the agents. After Thompson left to check the price on October 11, agents saw him with petitioner and later the undercover agents received heroin from him. As the court below points out (Pet. App. 34), it was reasonable to infer that Thompson got this heroin from petitioner. On October 12, Thompson met the agents at the time and place arranged the previous day for the purchase of heroin. After the agents learned from the telephone calls and from Thompson after his arrest that Thompson had set up a rendezvous for 4:30 p.m., between his source of supply and agent Robinson at 131st Street and Seventh Avenue,

[2] Actually Thompson could be expected to be more reliable than a regular government informer. Thompson had a greater stake in the narcotics sale being consummated successfully than an ordinary informer. The inference is reasonable that Thompson expected to receive from the petitioner part of the $3,600 agent Robinson was to pay for the heroin.

agents observed petitioner appear at the appointed time and place. By the time of petitioner's arrest Thompson's reliability had been sufficiently corroborated so that there was probable cause for her arrest without a warrant. See *Draper* v. *United States*, 358 U.S. 307, 312–314; *Rodgers* v. *United States*, 267 F. 2d 79, 88 (C.A. 9); *Spurlock* v. *United States*, 295 F. 2d 387 (C.A. 9), certiorari denied, 369 U.S. 877.

2. The record supports the conclusion of both courts below that, considering all the circumstances presented by this case, petitioner's act in turning over the suitcase was voluntary. After being questioned for no more than an hour in government automobiles in broad daylight on a public street, she admitted having other narcotics. She volunteered to take two agents to the 131st Street apartment but only on the assurance that she would not get anyone else in trouble. She set down conditions, that there be no more than two agents. She led them to an apartment as to which the agents had no prior specific information. Although agent Manley had seen petitioner enter and leave the building at 108 West 131st Street just prior to her arrest (R. 40a-41a), he did not know the number of the individual apartment to which petitioner later took him (R. 47a). It was the petitioner, not the agents, who gained entrance to the apartment and handed the suitcase and key to them with the announcement that the heroin was in the suitcase. No search of the apartment was necessary and no search was conducted. The agents were not required to ask petitioner who owned the suitcase since she stated it was hers (R. 42a). By merely opening

the suitcase with the key furnished by petitioner, the agent made the seizure complete. In these circumstances, where petitioner's consent was specific and intelligently given, there was clear basis for a finding that it was voluntary. Cf. *United States* v. *Mitchell*, 322 U.S. 65, 69; *United States* v. *MacLeod*, 207 F. 2d 853, 854–855 (C.A. 7).[3]

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1962.

[3] Cases relied upon by petitioner are distinguishable. In *Ray v. United States*, 84 F. 2d 654 (C.A. 5), the court observed that the officers "compelled" the accused to return to the house where the illegal search occurred (at p. 655) and spoke of the "forcible carrying back to his home" (at p. 656). In *Judd* v. *United States*, 190 F. 2d 649 (C.A. D.C.), and in *Channel* v. *United States*, 285 F. 2d 217 (C.A. 9), there was the coercive element of the defendants' presence in jail and in the Federal Bureau of Investigation office when giving their invalid consents, and general searches of the apartments were conducted. In *Canida* v. *United States*, 250 F. 2d 822, 825 (C.A. 5), there was no holding, as petitioner suggests, that an accused must be advised of his constitutional rights under the Fourth Amendment before he can legally consent to a search without a search warrant. The asserted oral consent in *Canida* was invalidated since obtained only after the failure of officers to force the accused to sign a written consent.

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